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LAW REFORM—N. YORK CODE OF PROCEDURE—SCHEDULE OF FORMS.

[By T. Walker.]

This great step in Law Reform, to which the attention of our readers has more than once been invited, has now been definitely taken by the State of New York. The code reported by the Commissioners, Messrs. Graham, Loomis, and Field, with some very slight alterations, to which we have not access, has become a law. The final vote in the Assembly stood 73 to 9—a most heart-cheering result to the lovers of reform.

In the May number of this journal, page 337, I expressed my preference for a reform, which should consist in the extension of Chancery forms to all cases of civil litigation, and spoke of the effort recently made in the Ohio Legislature to procure the passage of a law for that purpose.

In the April number, page 335, I published without comment the principal provisions of the New York Code on the subject of *Pleading*. These are, indeed, admirable for their simplicity, but not much superior in this respect to the system of Chancery pleading; while the latter has the very great advantage of being well tried, and understood.

In the present, and some following numbers, I propose to publish such other portions of the New York Code as will best illustrate its character, and aid those who desire to strive for similar reforms in other States.

The following is the "*Schedule of Forms*" recommended by the Commissioners.

SUMMONS.

To C——— D———.

You are hereby summoned to answer the complaint of A——— B———, of which a copy is hereto annexed, and to serve a copy of your answer on me at the city of Albany, within twenty days after the service of this summons, exclusive of the day of service, or [the plaintiff will take judgment against you for $ with interest from the first day of January, 1848.]

A. B., Pl'ff.
or
E. F., Pl'ff's Att'y.

Albany, February 1, 1848.

Or, if the action do not arise on contract for the recovery of money only, the following, instead of the part in brackets: [the plaintiff will apply to the next special term of the Court, at the on the day of for the relief demanded in the complaint.]

COMPLAINT.

Supreme Court:
County of Albany.
A. B.
agt.
C. D.

A—— B——, plaintiff, complains, that C—— D——, defendant, on the day of A. D. at by his promissory note in writing, for value received, promised to pay the plaintiff $1000, in thirty days thereafter, and that he has not paid the same: whereupon the plaintiff demands judgment against the defendant for the $1000, with interest from the day of

A. B., Pl'ff.
or
E. F., Pl'ff's Atty.

County of Albany. A. B. being sworn, saith, that he believes the foregoing complaint to be true.

Sworn this 1st day of Feb. 1848, before me. } A. B.

J. P., Com'r of Deeds.

N. B. We have prepared these forms by way of illustration merely, thinking it better not to make them part of the act, but to leave the parties to devise the best and the simplest forms for themselves. It will be seen that in the title, we have placed the plaintiff's name first in all cases, whether the pleading be on the defendant's part or the plaintiff's. This we think most convenient.

SUMMONS.

To C. D——.

You are hereby summoned to answer the complaint of A. B., of which a copy is hereto annexed, and serve a copy of your answer on me at the city of Albany, within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for $1000, with interest from the day of A. D.

A. B., Pl'ff.
or
E. F., Pl'ff's Atty.

Albany, Feb. 1, 1848.

County of Albany. G. H., of the city of Albany, being sworn, saith, that on the second day of February, at that city, he served personally on C. D., the defendant, a summons, of which the foregoing is a copy, together with a copy of the complaint therein mentioned.

Sworn this 2d day of February, A. D. 1848, before me, } G. H.

T. P., Com'r of Deeds.

JUDGMENT ROLL ON FAILURE TO ANSWER.

Supreme Court:
County of Albany.
A. B.
agt.
C. D.

A. B., plaintiff, complains, that C. D., defendant, on the day of A. D. , at by his promissory note in writing, for value received, promised to pay the plaintiff $1000 in thirty days thereafter, and that he has not paid the same: whereupon the plaintiff demands judgment against the defendant for the $1000, with interest from the day of

A. B., Pl'ff.
or
E. F., Pl'ff's Atty.

County of Albany. A. B. being sworn, saith that he believes the foregoing complaint to be true.

Sworn this 1st day of February, A. D. 1848, before me, } A. B.

T. P., Com'r of Deeds.

Supreme Court:
A—— B——,
agt.
C—— D——,

County of Albany. E—— F——, plaintiff's attorney in this cause, being sworn, saith, that no copy of an answer to the complaint has been served on him.

Sworn this 23d day of February, 1848, before me, } E. F.

T, P., Com'r of Deeds.

Supreme Court:
A. B.
agt.
C. D.
} Judgment.

February 23, 1848.

The summons, with a copy of the complaint in this action, having been personally served on the defendant, on the first day of February, 1848, and no copy of an answer to the complaint having been served on the plaintiff's attorney, as required by the summons, now, on motion of B. F., plaintiff's attorney, it is hereby adjudged that the plaintiff, recover of the defendant, the sum of $ with $ costs,

JUDGMENT ROLL ON ISSUE OF FACT.

[Same as above to the end of the Summons.]

ANSWER.

Supreme Court:
A. B.
agt.
C. D.

C. D., the defendant, answers to the complaint that on the day of he paid the note mentioned in the complaint.

C. D., Def't.
or
L. M., Def't's Atty.

County of Albany. C. D. being sworn, saith, that he believes the foregoing answer to be true.

Sworn this 4th day of February, 1848, before me, } C. D.

T. P. Com'r of Deeds.

Supreme Court:
A—— B——
agt.
C—— D——

County of Albany. At a Circuit Court held in this county, on the 15th day of February, A. D. 1848, before S. T., Justice, the jury found a verdict on the issue for the plaintiff, for the sum of $

O. P., Clerk.

Supreme Court:
A. B.
agt.
C. D.

This cause being at issue upon the facts, and a trial by jury had, on which a verdict was found for the plaintiff for $, now, on motion of E. F., plaintiff's attorney, it is hereby adjudged, that the plaintiff, recover of the defendant, the sum of $, with $ costs.

COMPLAINTS.

ENDORSEE AGAINST MAKER ON NOTE.

That the defendant on at , by his note in writing for value received, promised one G. H. to pay him or his order dollars in month from that day; that G. H. endorsed the note to the plaintiff, yet that the defendant has not paid the same, &c.

OR

That the defendant signed a note, of which a copy is hereto annexed, that the payee endorsed it to the plaintiff, yet that defendant has not paid the same.

ENDORSEE AGAINST ENDORSER ON NOTE.

That one G. H., on at , by his note in writing for value received, promised the defendant to pay him or his order dollars in months from that day; that the defendant endorsed the note to the plaintiff; that when it became due, it was presented to G. H. for payment, but that he refused to pay it, and that notice thereof was thereupon given to the defendant; yet that the defendant has not paid the same, &c.

OR

That one G. H. signed a note, of which a copy is hereto annexed, that the defendant endorsed it to the plaintiff; that when it became due, it was presented to G. H. for payment, but that he refused to pay it, and that notice thereof was thereupon given to the defendant; yet that he has not paid the same, &c.

PAYEE AGAINST ACCEPTOR, ON A FOREIGN BILL OF EXCHANGE.

That one G. H., at Liverpool, in England, on made his bill of exchange in writing, and directed the same to the defendant at the city of New York, and thereby required the defendant in days after sight of that his first of exchange, (the second and third of the same tenor and date not paid,) to pay to the plaintiff dollars for value received; that the defendant on accepted the bill, yet that he has not paid the same.

Complaint by payee against drawer, and by endorsee against drawer, acceptor and endorser, may be drawn in a smilar manner.

ON A POLICY OF INSURANCE.

That on the defendants signed a policy of insurance, of which a copy is here annexed; that the plaintiff was then the owner of the vessel therein mentioned, and continued such owner until her loss; that the vessel, while proceeding on the voyage described in the policy, was totally lost by the perils of the seas; that the plaintiff's loss, by reason thereof, was dollars; that on he furnished the defendants with proof of the loss and of the plaintiff's interest; yet that the defendants have not paid any part of such loss.

OR THIS:

That on the plaintiff was the owner of the ship then lying in the port of New York; that the defendants, in consideration of a premium therefor paid to them by the plaintiff, made a policy of insurance upon the ship for a voyage from New York to Cadiz, in Spain, and at and from Cadiz to her port of discharge in the United States, and thereby promised to insure for the plaintiff dollars upon the ship for the voyage, against the perils of the seas and other perils in the policy men-

tioned. And the plaintiff avers, that the ship sailed from New York on the voyage described in the policy, and while proceeding thereon was, by the perils of the seas, wrecked and totally lost, of which the defendants on had notice; yet that they have never paid any part of said sum.

ON A COVENANT.

That on the defendant executed, under his hand and seal, an instrument in writing, of which a copy is hereto annexed; that the plaintiff has complied with all its provisions on his part, but that the defendant has not complied with the following provision thereof, viz.:

FOR ASSAULT AND BATTERY.

That the defendant, at on assaulted and beat the plaintiff: wherefore the plaintiff demands judgment against the defendant for the injury, and that the defendant may be adjudged, to make to the plaintiff compensation in damages therefor to the amount of $

FOR TRESPASS IN TAKING GOODS.

That on at the defendant without leave, and wrongfully, took the following property of the plaintiff, viz.:

FOR TRESPASS IN ENTERING UPON LAND.

That on at the defendant, without leave, and wrongfully, entered a lot of land, of which the plaintiff is owner in fee, (or if he have a lesser estate, describe it) situated at and broke up the ground, &c.

FOR LIBEL.

That the defendant, being the proprietor (printer or publisher) of a newspaper published in the called the the following libel concerning the plaintiff was on the published therein, viz.:

OR

That the defendant on the at published the following libel concerning the plaintiff, viz.:

FOR SPECIFIC RELIEF ON ACCOUNT OF BREACH OF TRUST.

A—— B—— complains, that C—— D—— did, on the day of A. D. by an instrument then duly executed by all the parties therein named, of which a copy is hereto annexed, take upon himself the execution of the trusts therein mentioned, and has nevertheless committed the following breaches of trust.

* * *

Wherefore the plaintiff demands that the defendant may be restrained by injunction from any further disposition of the trust property, compelled to render to the plaintiff compensation in damages for the breaches of trust, removed from the trust, and another trustee appointed in his place. Dated

ANSWERS.

TO COMPLAINT ON NOTE.

Supreme Court:
County of Albany.
A—— B——
ag.
C—— D——

C—— D, defendant, answers to the complaint, That he did not sign the note mentioned in the complaint.

C—— D——, Def't.
or
L—— M——, Def't's Atty.

County of Albany. C—— D—— being sworn, saith, that he believes the foregoing answer to be true.

C—— D——.

Sworn this day of }
A. D. before me, }

T. B., Com'r of Deeds.

That on the day of he paid the note mentioned in the complaint.

That the note was not presented to G. H. for payment, as is alleged in the complaint.

ON INSURANCE.

That the ship was not lost by the perils of the seas. as is alleged in the complaint.

OR

That the plaintiff did not comply with the following conditions of insurance, viz.:

OR

That the vessel was unseaworthy when she sailed on the voyage mentioned in the complaint.

ON COVENANT.

That the defendant did comply with the provision in the agreement set forth in the complaint, therein alleged not to have been complied with by him.

FOR ASSAULT AND BATTERY.

That he did not assault or beat the plaintiff, as is alleged in the complaint.

FOR TRESPASS IN TAKING GOODS.

That he did not take the property mentioned in the complaint.

OR

That the property mentioned in the complaint was not the property of the plaintiff.

FOR TRESPASS IN ENTERING UPON LAND.

That he did not enter the lot of land mentioned in the complaint.

FOR LIBEL.

That the charge published, as alleged in the complaint, was true in all its parts.

REPLY.

Supreme Court:
Albany County.

A—— B——
agt.
C—— D——

The plaintiff A—— B—— replies to the answer of C—— D——, that the defendant did not pay the note mentioned in the complaint, as he has alleged in his answer.

A. B., Pl'ff.
or
E. F., Pl'ff's Atty.

County of Albany. A—— B——, being duly sworn, saith, that he believes the foregoing reply to be true.

Sworn this day of } A. B.
A. D. before me, }

T. P., Com'r of Deeds.

DEMURRER.

A—— B——
agt.
C—— D——

The defendant demurs to the complaint for the following grounds of objection, viz.:
First, ——
Second, —— * * *

C—— D——, Def't.
or
E—— F——, Def't's Atty.

ORDER OF ARREST.

A—— B——
agt.
C—— D——

To the Sheriff of the County of Albany:

You are hereby required forthwith to arrest the defendant, and hold him to bail in the sum of $ and to return this order to (the plaintiff or attorney subscribing or endorsing the order,) at on the day of A. D.

Albany, February 2, 1848.

J. W., Justice of the Supreme Court.
or
E. W., County Judge of the County of Albany.

UNDERTAKING ON THE PART OF THE PLAINTIFF.

A—— B——
agt.
C—— D——

Whereas, application has been made to J. W., Justice of the Supreme Court, for an order to arrest the defendant in this cause, we do hereby undertake, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding $

Albany, February 2, 1848.

UNDERTAKING OF THE BAIL.

A—— B——
agt.
C—— D——

The defendant having been arrested by the sheriff of the county of upon an order of arrest in this cause, granted by we, A. W. of farmer, and E W. of merchant, hereby undertake, in the sum of $ that the defendant shall at all times render himself amenable to the process of the Court, during the pendency of this action, and to such as may be issued to enforce the judgment therein.

NOTICE TO SHERIFF TO DELIVER PERSONAL PROPERTY.

A—— B——
agt. } To be endorsed on the affidavit.
C—— D——

To the Sheriff of the County of Albany:

You are hereby required to take from the defendant the property described in the within affidavit, and deliver it to the plaintiff.

Albany, February 2, 1848.

A—— B——. Pl'ff.
or
E—— F——, Pl'ff's Atty.

INJUNCTION.

A—— B——
agt.
C—— D——

It appearing satisfactorily to me, by the affidavit of that sufficient grounds therefor exist, I do hereby order that the defendant desist (or refrain) from until the order of the Court.

Albany, February 2, 1848.

J. W., Justice of the Supreme Court.
or
E. W., County Judge of the County of Albany.

SUPREME COURT OF ILLINOIS: DECEMBER TERM, 1847.

ABRAHAM BADGLEY *v.* ELI HEALD.

In a suit commenced before a Justice of the Peace, the plaintiff cannot recover a larger sum than is endorsed upon the summons as the claim or demand.

A contract to labor six months for eight dollars a month, is an entire contract; and to entitle the party to recover for his services, he must fully perform on his part, unless released by his employer, or compelled to leave his employment for some justifiable cause.

THIS was an action commenced before a Justice of the Peace of St. Clair County, by the defendant in error against the plaintiff in error. A judgment was there rendered in favor of the plaintiff for $14.37. The defendant appealed to the Circuit Court of said county, and the cause was tried before the Hon. GUSTAVUS P. KOERNER and a jury, at the November term, 1847. A verdict was rendered for the plaintiff for $15.46.

Other facts material to the decision of the case will be found in the Opinion of the Court.

The cause was argued in this Court *ex parte*, by W. H. UNDERWOOD for the plaintiff in error.

1. The Court below erred in rendering a judgment for more than the amount claimed and endorsed upon the summons, there being no interest on an indebtedness of this nature. *Dowling* v. *Stewart*, 3 *Scam.* 105; *Chenot* v. *Lefevre*, 3 *Gilm.* 643.

2. The Court below erred in refusing to grant Badgley a new trial. The evidence showed that Heald contracted with Badgley to work for him six months, with the privilege of quitting only at the end of the first month, and left Badgley's employment at the end of three months against his consent, and without any excuse. That he cannot recover in such a case, see *Cutler's Adm'r.* v. *Powell*, 6 *Term Rep.* 163; *McMillan* v. *Vanderlip*, 12 *Johns.* 167; *Lantry* v. *Parkes*, 8 *Cowen* 63; *Thayer* v. *Wadsworth*, 13 *Pick.* 349; *Winn* v. *Southgate*, 17 *Verm.* 358; *Ripley* v. *Chipman*, 13 *do.* 268; *Morford* v. *Mastin*, 6 *Monroe* 614; *De Camp* v. *Stephens*, 4 *Blackf.* 24; *Eldridge* v. *Rowe*, 2 *Gilm.* 98; *Posey* v. *Garth*, 7 *Miss.* 96. To tolerate a recovery in a case like this, would be to impair and destroy the obligation of contracts, which are regarded as sacred by the Constitution of the United States and this State. It would encourage men to disregard their contracts, and occasion damages, which no one but the party injured could fully appreciate or ascertain.

3. The suit was brought before the term expired, and therefore prematurely. *Crocker* v. *Goodsell*, 1 *Scam.* 107.

4. An accord and satisfaction was also fully established.

The Opinion of the Court was delivered by

Caton, J. Heald sued Badgley before a Justice of the Peace of St. Clair county, for work and labor. The demand endorsed on the back of the summons, and entered in the Justice's docket, was fifteen dollars, and the plaintiff there obtained judgment before the Justice for fourteen dollars and thirty seven cents. Badgely appealed to the Circuit Court, where it was tried by a jury, who rendered a verdict for the plaintiff below for $15.46. A motion was made for a new trial, which was overruled by the Court, and a judgment rendered for the amount of the verdict.

Two questions are presented for our consideration: 1. whether a verdict and judgment can be sustained which exceeds the amount demanded on the back of the summons; 2. whether the verdict is sustained by the evidence.

The evidence, as set forth in the bill of exceptions, shows that the plaintiff below worked for the defendant about three months; that he left the defendant's service about the 23d of July last; that at the time he left, the defendant was confined to his house by sickness. A witness swore that when Heald left Badgley's service, he told witness that he was going to quit working for Badgley; that he was going to Pennsylvania, and should go whether he got one cent from Badgley or not. He desired witness to inform Badgley of it, which he did. Another witness testified, that after Heald quit work, he was at Badgley's house, where he saw Badgley pay Heald eight dollars, who did not claim any more, and both parties seemed satisfied, and shook hands. The witness heard Badgley say at the same time that he would pay no more, unless he was compelled to do so by law.

Another witness testified, that shortly before Heald commenced work, he heard a conversation between the parties, in which they said that Heald was to work for Badgley six months, at eight dollars per month; " and at the end of the first month, either party might let the other off." The witness did not hear all of the conversation between the parties at that time, having gone into the house and left them talking, but that after he returned, both parties told him that the agreement was as above stated.

The first question presented is settled in the case of *Dowling* v.

Stewart, 3 *Scam.* 193, where this Court held that the statement of a claim made by a plaintiff, endorsed on the back of the warrant, and entered on the Justice's docket, concludes him, and that it is error in the Court to render judgment for more. The excess, in the present case, is forty-six cents, and, although it is small, yet it is not so small that the maxim, *de minimis non curat lex*, will apply. But the verdict in this case cannot be sustained by the evidence. By the contract between the parties, Heald was to work for Badgley six months at eight dollars per month, with the right to either party to terminate it at the end of the first month. This was an entire contract—as much so as if the agreement had been to work the six months for forty-eight dollars, with the privilege to either party to put an end to the contract at the end of the first month, when Heald should receive eight dollars. As the agreement was not terminated at the end of the first month, it was then the same as if it had never contained such a provision. The evidence clearly shows, that Heald abandoned the service of Badgley before the completion of the contract, and without the consent of Badgley, or any justifiable cause. Nor can it be said that Badgley subsequently consented to the rescinding of the contract by the payment of the eight dollars, even were that admissible; for, although Badgley did pay Heald eight dollars, yet he did it under a protestation that he was not bound to pay it; for he said "he would not pay him, plaintiff, any more unless he was compelled to pay it by law." It is manifest from this, that what he paid at that time he intended as a gratuity, or did it to buy his peace, under a protest against further liability. It clearly appeared that this work was done under an entire contract which the plaintiff below refused, without any excuse, to fulfill; and the law, as laid down by this and various other Courts, determines that he is entitled to no compensation.

The case of *Lantry* v. *Parks*, 8 *Cowen* 63, is precisely like this. There the plaintiff had agreed to work for the defendant one year, at ten dollars per month. He worked ten and a half months, and then left the defendant's service, saying he would work no more till he ascertained whether he could collect his wages. It was there held that the agreement was entire, and that the plaintiff could collect nothing till he had performed his part of it. The same rule is unequivocally held in the cases of *McMillan* v. *Vanderlip*, 12 *Johns.* 165; *Jennings* v. *Camp*, 13 *do.* 24; *Spain* v. *Arnott*, 2 *Stark.* 256; *Decamp* v. *Stevens*, 4 *Blacf.* 24; *Ripley* v. *Chipman*, 13 *Verm.* 268;

Morford v. *Mastin*, 6 *Monroe* 609; *Thayer* v. *Wadsworth*, 19 *Pick.* 349. Numerous other cases might be cited in support of this law, but it is unnecessary. Nor is there any hardship in this rule, as it might at first appear. It is reciprocal, for if the employer turn off the servant before the expiration of the time agreed upon, without any just cause, the latter may recover the full amount agreed upon, as if he had worked out his whole time. *Posey* v. *Grath*, 7 *Missouri* 64.

But this is not an open question in this Court. It was the only question involved in the case of *Eldridge* v. *Rowe*, 2 *Gilm.* 98, where this Court reversed the judgment of the Circuit Court for overruling a motion for a new trial, where the evidence showed that the party had quit the service of his employer before the expiration of the time which he had agreed to serve, although in that case the evidence showed that Eldridge had made to Rowe three propositions: 1, that Rowe should work out his time; or 2d, get some other man to work out his time for him; or 3d, that he (Eldridge) would pay Rowe $30 for what he had done, and let him quit, and that Rowe should let him know on that day which he would do. Within the time allowed, Rowe sent word to Eldridge that he was not going to work for him any more; and yet this Court held that this evidence was not sufficient to authorize the jury to find that Rowe had accepted the third proposition, to quit work and accept thirty dollars for what he had done. And the jury found that the original agreement had been rescinded by mutual consent, and a new agreement substituted, which finding was approved by the Circuit Court, and yet the judgment was reversed, because there was no evidence to sustain the verdict. That is certainly a much stronger case than the one before us.

The judgment is reversed with costs, and the cause remanded.

Judgment reversed.

SUPREME COURT OF ILLINOIS: DECEMBER TERM, 1848.

De Marquis Misner et al., Appellants, v. E. Granger, Appellee.

WARRANTY OF CHATTELS.

It is a well established rule of the common law, that a purchaser takes property at his own risk, unless he exacts a special warranty, where there has been no fraud on the part of the vendor. To this rule, however, there are exceptions.— There is an implied warranty on the part of the vendor, that he has a good title to the property he sells, and where a quantity is sold by a sample, that the bulk is of as good a quality. So also in the case of executory contracts for the sale of personal property, in the absence of an express stipulation to that effect, the law implies that it shall be of a fair, merchantable quality and condition; and this rule holds, whether there be a sample exhibited, or there is an opportunity for inspection. But, in such case, there is no implied warranty as to fineness or particular degree of quality of the article sold.

Where the manufacturer sells his own goods or wares, and nothing is said of the quality, there is an implied warranty that they are of a fair, ordinary quality, according to their appearance. There is, however, a qualification to this rule, as where the article is of such a character that ordinary skill cannot ordinarily produce a good article, but success depends in a great measure on chance. Sometimes, also, the law will imply a warranty even of an extraordinary quality in the article sold, as where an article is furnished for a given, specific purpose, and not for the ordinary and general use to which such articles are applied.

In an action of *assumpsit* upon a promissory note, it was alleged in the pleas that it was given for the price of a threshing machine, bought by the defendant of the plaintiff, of which the following was the note or memorandum of the sale:— "Chicago, July 12, 1843. Mr. De Marquis Misner bought of E. Granger, one threshing machine at one hundred and eighty dollars, for which he has paid forty four $44. The remaining $136, he is to give his and his brother Fletcher Misner's note. The said note is to be delivered at the time of the delivery of the machine, say about the 22d inst. The machine is to be in readiness for use at that time. Elihu Granger." It was further alleged that Granger was a machinist, and carrying on that business; also, that he was a machinist, and carrying on a foundery. All the pleadings averred that, upon trial, the machine would not answer the intended purpose, &c. None of them, however, averred that Granger was the manufacturer of the machine: *Held*, that the pleas were defective for not averring a warranty, or that the party undertook and promised that the article was of the given quality.

Assumpsit, in the Cook Circuit Court, brought by the appellee against the appellants, and heard before the Hon. Jesse B. Thomas, at the November term, 1847, on demurrer to pleas, which was sustained. The defendants excepted to the decision, and pleaded the general issue, when a judgment was rendered by the Court for the amount of the note sued, with interest. The defendants then appealed.

The cause was submitted in this Court upon the written arguments of counsel.

N. B. Judd, for the appellants.

1. The contract of sale, as set up in the several pleas, shows an agreement by the vendor that the machine should be in readiness for use at the time of its delivery.

If that agreement on the part of the vendor was not complied with, the damages resulting from such non-compliance, is a proper matter to be deducted from the price when a suit is brought for it. *Edwards* v. *Todd*, 1 *Scam.* 42; *Nichols* v. *Ruckles*, 3 *do.* 228; *Hawks* v. *Lands*, 3 *Gilm.* 227. Each of the pleas shows a breach of that agreement, and the defendants were entitled to damages under them.

2. No particular form of words is necessary to constitute a warranty: any representation as to any material fact which is relied upon by the parties will amount to a warranty.

On the sale of a manufactured article designed and intended for a particular purpose or use, a representation at the time of the sale, or a covenant in the bill of sale that the machine is in readiness for use, amounts to, and is, a warranty that the machine is reasonably fit to use in the business, and for the purposes for which it was intended and sold.

The machine, it is alleged in the plea, was purchased for a particular purpose.

There was a representation and agreement by the vendor that the article sold was in readiness for use.

Each of the pleas alleges that such was not the fact, and shows wherein the defects consisted, one of them alleging that the material and workmanship were both so bad that the machine entirely failed to be in readiness for use.

The defendants were not bound to call the agreement or representations a warranty; they were only bound to plead the facts, and it is for the Court to say whether the facts constitute a warranty.

The pleas show an express warranty and a breach of it, and were, therefore, a good defence.

3. On the sale of manufactured articles, there is an implied warranty that the article sold is reasonably fit for the purpose for which it was sold and intended to be used. *Gray* v. *Cox*, 4 *B. & C.* 108; *Jones* v. *Bright*, 5 *Bing.* 533; *Brown* v. *Eddington*, 2 *M. & G.* 279.

The pleas show that this was a manufactured article, and sold for a particular purpose. The agreement also shows that the vendor

was the manufacturer. The bargain is made on 12th July, and the vendor agrees to have the machine in readiness for use, and deliver it on 22d of July.

The facts pleaded bring this cause within the rule laid down in *Gray* v. *Cox*, and *Jones* v. *Bright.*

The pleas show a breach of the implied warranty that the article sold should be reasonably fit for the purposes for which it was sold.

4. The demurrer extends back, and reaches the first error in pleading. The first error was in the first count of the plaintiff's declaration. In that count there is no averment as to where the cause of action accrued. It may be said that by pleading the general issue, the party is estopped from going back to the declaration. In the case of the *Auburn and Owasco Canal Co.* v. *Leith*, decided in the Supreme Court of New York, and reported in the Sept. No. of the Law Reporter, 1847, the whole question is discussed, and the various *dicta* on that subject overruled; and it is *held*, that by demurring to a special plea, the count to which it is an answer is reached, notwithstanding the general issue may have been pleaded.

I. N. Arnold, for the appellee.

Were defendant's pleas good?

The defendant's plea sets forth a bill of sale of threshing machine from Granger to Misner, which was the consideration of the note; but they do not allege either an express or implied warranty, nor fraud, nor that Granger was the manufacturer of the machine, nor a return of property, or offer to return it.

It is necessary to allege and prove either fraud or express warranty. *Towell* v. *Gatewood*, 2 *Scam.* 25.

A bill of sale of tobacco, describing it as good, first rate tobacco is no warranty, neither is the sale of a threshing machine a warranty that the machine sold is a good one. This case is conclusive on the point of express warranty. *Ib.*

Cash v. *Giles*, 14 *Eng. Com. Law R.* 372, is a case which not only settles the principle, but is in relation to same subject matter. The action was *assumpsit* to recover the price of a threshing machine. The opinion is short, and is therefore quoted: "If defendant meant to insist that this threshing machine was not a good one, and suitable to its intended purpose, it was his duty either to have immediately returned it, or to have given immediate notice to plaintiff to take it away. Now, instead of this, he keeps it for several years. I am clearly of opinion that, as he has done so, he has waived all objections to its goodness, and is bound to pay for it."

In this case, defendants do not aver in their pleas either a return, or offer to return the machine.

In *Gray* v. *Cox*, 4 *B. & C.* 108, cited by the appellants, it was held, that the vendor was not liable, because there was neither an express warranty nor fraud. The article sold was coffee, at market price, which turned out to be a poor article.

In the case of *Jones* v. *Bright*, 5 *Bing.* 533, the *narr.* averred fraud, and there was an express warranty. The vendor was a manufacturer. In this case it was not averred that he was. In fact, he was the mere seller.

It is no great presumption to suppose that the vendee knew what a threshing machine was, and whether the machine bought was a threshing machine or not.

The general doctrine, that the seller is answerable only for an express warranty and fraud, is clearly laid down in 2 *Kent's Com.* 478.

The cases of *Hart* v. *Wright*, 17 *Wend.* 267, and *Waring* v. *Mason*, 18 *do.* 425, strongly and ably sustain the rule of *caveat emptor*

The opinion of the Court was delivered by

Caton, J. The subject of implied warranties on the sale of chattels has perplexed the Common Law Courts for a long time, and has been a source of many apparently contradictory decisions. The universal doctrine of the Civil Law is, that there is an implied warranty of the vendor, that the article sold is what it appears to be, and is sold for sound and of a merchantable quality; in other words, the seller takes the risk of all defects which are not disclosed at the time of the sale.

In the case of *Stuart* v. *Wilkins*, *Douglas* 20, Lord Mansfield held, that the vendor of a horse was not responsible for any defects, unless he was guilty of a fraud, or had made an express warranty. Before that time, it is said by Grose, J., in *Parkinson* v. *Lee*, 2 *East.* 314, it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness. The rule laid down by Lord Mansfield in 1778, has since been followed with great uniformity, not only by the Courts in England, but in most of the United States, where the Common Law prevails, although it appears occasionally to have been departed from in the case of a sale of slaves; and, in South Carolina, was applied for a time to sales of other property.

It may now safely be asserted, as the well established rule of the Common Law, that the purchaser takes the property at his own risk, unless he exacts a special warranty, where there has been no

fraud on the part of the seller. 2 *Black. Com.* 451; *Seixis* v. *Woods*, 2 *Caines*, 48; *Swett* v. *Colgate*, 1 *Wend.* 185; *Conner* v. *Henderson*, 15 *Mass.* 319; *Hart* v. *Wright*, 17 *Wend.* 267; *Holden* v. *Dakin*, 4 *Johns.* 421; *Davis* v. *Meeker*, 5 *do.* 354; *Cunningham* v. *Speer*, 13 *do.* 392; *Thompson* v. *Ashton*, 14 *do.* 316; *Hoyt* v. *Boyle*, 5 *Gill & Johns.* 110.

To these decisions many might be added from different States, but it is unnecessary. The law seems to be so well settled that we do not feel ourselves at liberty to inquire whether the rule of the Civil Law, or of the Common law, is the best adapted to promote the ends of justice and the good order of society. It is probably more important that the rule which is to govern should be definitely settled, and well known, than that either particular one should be adopted.

Like most other general rules, this has its exceptions, which appear to be pretty well settled, and are sustained by good reason.

The Common Law has always held, that there is an implied warranty on the part of the vendor that he is conveying a good title to the vendee in the sale of personal property. Where a quantity is sold by sample, the law implies a warranty that the bulk is of as good a quality as the sample. *Sands & Camp* v. *Taylor*, 5 *Johns.* 395; *Andrew* v. *Kneelan*, 6 *Cowen*, 354; *Bradford* v. *Manly*, 13 *Mass.* 139; *Gallagher* v. *Waring*, 9 *Wend.* 20; *Oneida Manufacturing Society* v. *Lawrence*, 4 *Cowen*, 440.

So, also, in the case of executory contracts for the sale of personal property, the law implies as a part of the contract, in the absence of any express stipulation to that effect, that the property shall be of a fair merchantable quality and condition, (*Long* v. *Fidgeon*, 1 *Eng. Com. L. R.* 327,) and it seems to be the same where the purchase is made without sample, or an opportunity of inspection, although, if there is no specific agreement as to the quality, no warranty is implied as to the fineness or particular degree of quality of the article sold. *Gallagher* v. *Waring*, 9 *Wend.* 28. In such cases it would seem manifestly unjust to say *caveat emptor*, when the purchaser has no opportunity of looking out for himself. If there is no fraud, and he takes the article on inspection, or with an opportunity to inspect it, he ought not to complain. In speaking of the general rule on the subject of warranties in the sale of chattels, Mr. Justice Cowen, in the case of *Hart* v. *Wright*, 17 *Wend.* 272, after stating the general rule of *caveat emptor*, says: "There are certainly exceptions, but they depend on peculiar circumstances. One is the sale of provisions to be used as food for mankind. This

rests on a regard to the public health, (*Von Brocklin* v. *Fonda*, 12 *Johns.* 468,) and I am not aware of any other case in this State, wherein a warranty of quality is engrafted on a sound price alone." I am aware that Mr. Senator Tracy, in the review of this very case, in 18 *Wend.* 458, in the Court of Errors, has opposed, with all the force of his luminous mind, this proposition, but he produces but two authorities against it, (*Dyer*, 75, and *Emerson* v. *Brighton*, 10 *Mass.* 197,) and finds himself under the necessity of joining Lord Radesdale in discrediting Blackstone, as authority generally, who has laid down the same principle. 3 *Black. Com.* 166. Notwithstanding the apprehensions which Mr. Tracy entertained from the progressive principle of the present age, we think the exception is founded in reason, supported by authority, and required by considerations of public policy.

Again, generally, where a manufacturer sells his goods or wares, and nothing is said about the quality, he is held to warrant them to be of a fair ordinary quality, according to their appearance; as, if a manufacturer sell an axe, and, upon trial, it prove to be so hard as to be unfit for use, there the vendor is responsible for the defect. To this there may be qualifications, as where the article is of such a character that ordinary skill cannot ordinarily produce a good article, but success depends in a great manner upon chance.

Sometimes, also, the law will imply a warranty even of an extraordinary quality in the article sold, as where an article is furnished for a given, specific purpose, and not for the ordinary and general use to which such articles are applied.

In *Jones* v. *Bright*, 15 *Eng. Com. Law R.* 529, the bargain was this: A third person, who introduced the plaintiff to the defendants, said: "Mr. Jones is in want of copper for sheathing a vessel;" and one of the defendants answered: "We will supply him well." The Court say: "As there was no subsequent communication, that constituted a contract, and amounted to a warranty." And the Court in that case lays down this rule: "If a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it is fit for that particular purpose." In this case, the defendants were the manufacturers of the copper, which was selected by the plaintiff's shipwright. The declaration averred a warranty of the copper which proved to be defective, and the plaintiff recovered.

In *Brown* v. *Eglington*, 40 *Eng. Com. Law R.* 371, the plaintiff had applied to the defendant for a crane rope to raise pipes of wine.

The defendant sent his foreman to examine the crane, and take an admeasurement for the rope, and then procured one Dunn to manufacture it, which proving defective, the plaintiff was allowed to recover on the ground of an implied warranty. In this case, the Court say that the defendant should be considered the manufacturer of the rope, although he employed another to make it. In *Gray* v. *Cox*, 10 *Eng. Com. Law R.* 283, the defendants were copper merchants, not manufacturers, and the Court was divided in opinion whether the law would imply a warranty from a sound price. The circumstances of this case were in all respects like those in the case of *Jones* v. *Bright*, except that the venders were not the manufacturers of the copper.

I remember a case, which is not now before me, where the plaintiff applied to the defendant, who was a shipwright, to purchase a vessel for the purpose of transporting a particular kind of goods which required an unusually tight vessel, and the defendant sold him a barge, which was then nearly finished laying at his wharf, for that particular trade. I think the defendant had previously furnished the plaintiff with vessels for the same trade. On the first voyage the barque leaked so much as to damage the cargo, and the defendant was made to answer in damages on an implied warranty, that the vessel was fit for that particular trade. There the defendant was the builder of the barge.

To apply these principles to these pleas. They aver that the note, for which the suit is brought, was given for the balance of the price of a threshing machine, bought by D. Misner of the appellee, of which the following is the agreement or note of the sale:

"Chicago, July 12, 1843.

"Mr. De Marquis Misner bought of E. Granger one threshing machine, at one hundred and eighty dollars, for which he has paid forty four $44. The remaining $136 he is to give his and his brother Fletcher Misner's note. The said note is to be delivered at the time of the delivery of the machine, say about the 22d inst. The machine is to be in readiness for use at that time.

(Signed) Elihu Granger."

One of the pleas avers that Granger was a machinist, and carrying on said business in Chicago; and the second and third special pleas aver that he was a machinist and carrying on a foundery in Chicago. They all aver that the machine was received and the note given before it was tested, and that, upon trial, it would not answer the purpose for which it was intended and purchased.—

Some of the pleas set out particularly the parts that failed. One of the pleas concludes with a failure of the consideration of the note, and the others set out special damages, and offer to set them off, &c.

A special demurrer was filed to these pleas assigning, 1st, no averment of express or implied warranty, or fraud; 2d, no proper breach; 3d, it is not averred that Granger manufactured the machine, and the pleas are argumentative.

The demurrer was sustained to these three pleas, which presents the only question that we think it necessary to examine.

It is insisted that these pleas show an implied warranty of this threshing machine by Granger, 1st, because it is a manufactured article; 2d, because Granger was the manufacturer of the machine; and 3d, that it was furnished for a particular, special purpose.

The first proposition is true in fact, but I find no satisfactory authority showing that the conclusion drawn from it is law. In order to make out the implied warranty, it requires also that the second of the above propositions, that is, that Granger was the manufacturer of the machine, should be shown. This neither of the pleas avers. One of the pleas says that he was a "machinist and carried on said business in Chicago." This is far from being an averment that his business was making threshing machines, or that he made this machine. The truth probably is, that there are but very few machinists who make threshing machines. In order to make out Granger a manufacturer of threshing machines, we should have to reverse the rule of presumptions and intendments and raise them in favor instead of against the pleading. The same may be said of the other two pleas in this respect. They are alike, and say, "the said plaintiff being a machinist and carrying on a foundery in Chicago." We understand that there is only a portion of a threshing machine that is cast at a foundery.

Admitting that the general vendor, who is not the manufacturer of an article which he sells for a particular purpose, impliedly warrants it to answer that purpose—which we are not now prepared to say is the law—these pleas do not show such a case. They do not show that this machine was sold for any other purpose than that to which threshing machines are ordinarily and generally applied. It is not like the case of the rope which was sold for the express purpose of raising pipes of wine; or of the vessel which was sold for the purpose of transporting a particular kind of goods, where warranties were implied that they were fit for those particular uses.

For aught that appears from these pleas, Granger was a mere dealer in and not a manufacturer of the article; entirely ignorant of the defects complained of, and that it was received by Misner after an inspection of it, when he had as good a chance to judge of its quality as Granger had. In such case the Common Law says, "look out for yourself."

But these pleas are defective in form. Instead of pleading the evidence in the case from which the party supposed the law would imply a warranty, he should have averred the warranty at once, or at least that the party undertook and promised that the article was of the given quality, and not have contented himself with setting forth the evidence by which he intended to prove the warranty. Mr. Gould, in his work on Pleading, page 59, § 19, says: "There is indeed no such thing as an implied promise in pleading; or rather, the fact of its being implied appears only in evidence, and never upon the record." Were it otherwise, pleadings would soon become as voluminous as depositions. As well might a plaintiff declare on an account for goods sold, &c., and omit the averment of a promise to pay by the defendant. Ordinarily that is but an implied promise, and yet it would hardly be contended that a declaration would be good without averring a promise to pay. In all of the cases of implied warranty which I have examined, the pleadings show directly, either that the party warranted, or that he undertook and promised that the article was of the particular quality.

The demurrer was properly sustained, and the judgment of the Circuit Court is affirmed with costs. *Judgment affirmed.*

SUPREME COURT OF OHIO: HAMILTON COUNTY, MAY TERM, 1848.

[BEFORE JUDGES READ AND HITCHCOCK.]

Feidler *v.* Blow, Owens and Gallespie.

Held, that where a Writ of Attachment issues against the joint property of three defendants, the separate property of one cannot be attached.* That where a garnishee is called upon, by proceedings in attachment, to perform the contract made with the defendant, he is only bound to pay to the attaching creditors that which, by the contract, he was bound to pay to the defendant.

Certiorari: Plaintiff sued out of the Superior Court of Cincinnati a Writ of Attachment against the joint effects of all the defendants, and also process against Samuel Wiggins as garnishee. The Sheriff found no property, but summoned the garnishee. Wiggins, in his answer, denied his indebtedness to the defendants. He stated that in 1842 he bought of Owens & Gallespie a lot of dry goods, and agreed to pay for them on 1st September, 1844, $7,500 in the paper of Owen & Gallespie, or the paper of defendants. Plaintiff made publication of the issuing and return of the writ; filed his declaration; entered defaults against defendants, and subsequently moved for judgment.

V. Worthington moved to dismiss the proceedings for want of jurisdiction.

Storer & Gwynne for plaintiffs, *contra*.

The Superior Court sustained the motion, and this writ is prosecuted to reverse that judgment.

Hitchcock, J. Where two or more are jointly bound, or indebted, the statute authorizes a writ of attachment to issue against the separate or joint estates, or both, or any of them, but in this case the writ issued against the joint property only.

The writ did not authorize the attaching of the separate property. As no joint property or effects were found, we cannot say that the Superior Court erred in this particular.

The garnishee's rights are not affected by this statute. His indebtedness to the defendants is to be paid in the same manner as if paid direct to the defendant. If ready in this case to pay in the

* *Vide Winchester, Irwin & Co* v. *Pierson & Co.*, 3 *Western Law Journal*, 133, where this point is ruled the same way.

paper of the defendants, he could not be compelled to pay in any thing else, and such payment could not avail the plaintiff any thing.

We think the Superior Court did not err in dismissing the proceedings for want of jurisdiction.

SUPREME COURT OF OHIO, HAMILTON COUNTY: MAY TERM, 1848.

[BEFORE JUDGES READ AND HITCHCOCK.]

ROGERS AND OTHERS, PLAINTIFFS IN ERROR, *v.* TURNER AND KENNEDY, DEFENDANTS IN ERROR.

COMPETENCY OF WITNESS—INTEREST.

Where the witness offered by the plaintiff, in a conversation with the defendant, claimed that he had been injured by the defendant in the same manner as that claimed by the plaintiff, and the defendant told him that if plaintiff's suit was decided in favor of plaintiff, he would pay the witness without suit, *Held* that the witness was competent.

ERROR to the Superior Court of Cincinnati. Turner & Kennedy sued Rogers & Brothers in the Court below, to recover damages occasioned by a collision of their coal boat with the steam boat of Rogers & Brothers. To support their case, they introduced a witness who stated that, on the night of the collision between the plaintiffs' and defendants' boats, he, the witness, was navigating a flatboat down the Ohio river, opposite Cincinnati, and that a collision occurred between his boat and the defendants' boat, by which his boat and her load were sunk and destroyed; that he afterwards went to the office of the defendants and claimed pay for his boat and cargo; that a son of one of the defendants said a suit had been brought by the present plaintiffs, and if it should be right that they should pay for the boat, they would pay for it—that if this suit was decided in favor of the plaintiffs, they would pay the witness for his boat without suit; and if the plaintiffs recovered in this suit, he, the witness, expected the defendants would pay him without suit, if they were men of their word; that he expected this suit to decide whether it was right for them to pay for the flatboats or not.

The defendants objected to this witness, claiming that he was incompetent on account of interest. This objection was overruled,

and the witness permitted to testify. The defendants excepted to this ruling of the Court. Judgment being entered for plaintiffs, the defendants prosecuted this writ of error.

Fox, for the plaintiffs in error, cited *Forrester* v. *Pigeon*, 3 *Camp. Rep.* 380; 1 *Greenleaf on Ev. S.* 392, 395.

Taft, for defendant in error.

Read, J. If the witness and the defendants, at the time of the conversation, set forth in the bill of exceptions, made a contract by which his claim against the defendants was to abide the result of this suit, the witness was incompetent; if the conversation did not amount to a contract, then he was competent. This is a question about which, perhaps, there may be, in the minds of some, some doubt. We have arrived at the conclusion that it was not a contract, and that, therefore, the witness was competent. *Judgment affirmed.*

THE LICENSE LAW IN DELAWARE.

Rice *v.* Foster. In our last No. (p. 371,) we noticed the decision in this case. We had not room in that No. for any extracts from the opinion of the Chief Justice. We now give our readers such extracts as are to be found in the Pennsylvania Law Journal. We regard the opinion as well worthy of a careful perusal.

"Admitting, for the sake of argument, (but it is denied by a majority of this Court,) that the alleged returns are properly authenticated, and afford sufficient legal evidence, that a majority of the votes in New Castle county was against licensing the retailing of intoxicating liquors, then the important question which has been argued in this cause arises, whether the act of the nineteenth of February is unconstitutional.

"The proposition that an act of the Legislature is not unconstitutional, unless it contravenes some express provision of the constitution, is, in the opinion of this Court, untenable. The nature and spirit of our republican form of government, the purpose for which the constitution was formed, which is to protect life, liberty, reputation, and property, and the right of all men to attain objects suitable to their condition, without injury by one to another; to secure the

impartial administration of justice, and, generally, the peace, safety and happiness of society, have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass. An act of the Legislature, directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning, and can have no more obligatory force than when it opposes some express prohibition contained in that instrument. It is irrational to maintain that such an act is a law, when it defeats the very object and intention of granting legislative power. Therefore an act, such as that mentioned in the argument, to make a man a judge in his own cause, would not be valid; because it never was the intention of the constitution to vest such power in the Legislature; the exercise of which violates the plainest principles of natural justice. So, also, an act is void if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government. Of this character, it is contended, is the act of the Legislature of the nineteenth of February, 1847.

"The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the constitution of the United States, and of the constitution of the State, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal, and, indeed, greater dangers resulted from a pure democracy than from an absolute monarchy. Each leads to despotism. Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people, under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion, and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker; the great aim and objects of civil government are prostrated amidst tumult, violence, and anarchy; and those pretended patriots abounding in all ages, who commence their political career as the disinterested friends of the people, terminate it by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of Revolutionary France, in the days of her short-lived, misnamed Republic, shocked the friends of rational liberty throughout the civilized world. There, in the midst of the most refined

and polished nation of Europe, the guillotine dispensed with the forms of law as unmeaning pageants; and, under the capricious mandates of popular frenzy, running wild in pursuit of the phantom of a false, licentious liberty—'suspicion filled their prisons, and massacre was their gaol delivery.' * * * * * *

"The legislative, executive and judicial powers compose the sovereign power of a State. The people of the State of Delaware have vested the legislative power in a General Assembly, consisting of a Senate and House of Representatives; the supreme executive powers of the State in a Governor, and the judicial power in the several courts mentioned in the sixth article. The sovereign power, therefore, of this State resides with the legislative, executive and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so would be an infraction of the constitution and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance, or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. And although the people have the power, in conformity with its provisions, to alter the coustitution, under no circumstances can they, so long as the constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government. It is equally clear, that neither the legislative, executive, nor judicial departments, separately, nor all combined, can devolve on the people the exercise of any part of the sovereign power with which each is invested. The assumption of a power to do so would be usurpation. The department arrogating it would elevate itself above the constitution; overturn the foundation on which its own authority rests; demolish the whole frame and texture of our republican form of government, and prostrate every thing to the worst species of tyranny and despotism, the ever varying will of an irresponsible multitude. The powers of government are trusts of the highest importance; on the faithful and proper exercise of which depend the welfare and happiness of society. These trusts must be exercised in strict conformity with the spirit and intention of the constitution by those with whom they are deposited; and in no case whatever can they be transferred or delegated to any other body or persons; not even to the whole people of the State; and still less to the people of a county. It is a plain proposition of law, that a power or authority vested in one or more persons to act for others, involving in its exercise judgment and discretion, is a trust and confidence reposed in the party, which cannot be transferred or delegated. The making of laws is the highest act of sovereignty that can be performed in a free nation; and, therefore, the legislative power may be truly said to be the supreme power of a State. Its exercise requires superior intellectual faculties, improved by study and experience; although it seems to be a

common notion, with many pretended advocates of popular rights at the present day, that every man is instinctively fitted to be a member of the Legislature. If the legislative functions can be transferred or delegated to the people, so can the executive or judicial power. * * * * * * * * *

"If the delegation of the legislative power of the State to the people of a county, to make laws through the medium of a ballot-box, involving in it an abandonment by the Legislature, of the trust reposed in them, which they have sworn to execute with fidelity, does not seem to many persons to be destructive of the constitution, and to lead to all the dangers of democracy, against which the founders of our government were so anxious to guard; it can be only because it is presented under the specious appearance of a profound deference and devotion to the popular will; and because its destructive tendencies are clouded and obscured by the incense of adulation offered to the majesty of the people. * * * * *

"The design and true character of the act of the nineteenth of February last, are to confer the functions of the Legislature of the State upon the people of a county, to give them the means of exercising legislative power, by authorizing them to decide, by their votes, whether the retailing of intoxicating liquors should thereafter be lawful in their county.

"A law, when passed by the Legislature, is a complete, positive, and absolute law in itself, deriving its authority from the Legislature, and not depending for the enactment of its provisions upon any other tribunal, body, or persons. It may be limited to expire at a certain period; or not to go into operation until a future time, or the happening of a contingency, or some future event; or until some condition be performed. Of this description are many laws of the general government respecting duties and imposts; and laws of our own State respecting private corporations; which latter are not to operate until some condition be performed, or the assent of the corporators be given; because a private incorporation is a contract between the State and the corporators; and, therefore, the Legislature cannot compel persons to become an incorporated body; or, against their consent, impair, alter, or repeal the rights and privileges conferred by the charter. All such laws are complete and positive in themselves, when they pass from the hands of the Legislature, and are not to become laws by the creative power of other persons. But the Legislature is invested with no power to pass an act which is not law in itself when passed, and has no force or authority as such, and is not to become or be a law until it shall have been created and established by the will and act of some other persons or body, by whose will also existing laws are to be repealed, or altered and supplied. The act of the nineteenth of February, 1847, is of this character. In a legal sense, it is not a law; it is not complete and positive in itself. It is not a rule prescribed by the supreme power of the State to its citizens, enforcing some duty or prohibiting some act; but was to become a rule only when enacted

or sanctioned by the popular vote of a county; and then to be a rule, prescribed, not by the constitutional legislative power of the State, but by the power of the majority in a county over the minority. Excepting the fifth section, the act of February last, in effect, is in the nature of a bill prepared and presented by the Legislature of the State to the people of each county, to be enacted or rejected by them." * * * * * * * *

Of course, in a question involving such important principles, it is not likely that any analogous case would remain uncited, and authorities were brought forward to the effect that "the Legislature have the right to pass conditional laws, which are to commence their operation, or be void, upon the happening of some future event;" that "in each school district a tax may be laid if a majority of the school voters shall so determine;" and that to the city council of Wilmington was delegated the power "to declare, by ordinance, whether the Mayor's Court of that city should try cases of assault and battery by jury or not." The act in relation to free schools seems to us most to resemble the one before the Court, of this they say:

"By the law of this State, for establishing and supporting free schools, each school district is constituted a corporation, with limited powers—the clear income of the school fund is apportioned among the several counties—the share of each county is divided among the several school districts of such county, and an equal portion given to each, as a *donation;* provided the voters in such district raise, by *subscription* or *tax*, in any one year, a sum equal to *one-half* of such district's share of the school fund. *Vol.* 8, *Del. Laws*, 21. But no tax can be levied or assessed in any school district, unless upon a vote by ballot there shall be a majority of votes for the tax. *Vol.* 8, *Del. Laws*, 171.

"In the distribution of the school fund, the Legislature had the right to appropriate an equal portion to each school district, as a donation; and to prescribe, as a condition, that before it should be paid, a certain sum should be raised in the district, either by voluntary subscription or by a tax, as should be determined upon by the corporators themselves. No power is granted to them, or to any other persons, to repeal or change any part of the law; nor does its existence or operation depend on the performance of the condition, in any manner, upon the will or acts of the corporators. If the condition be not performed, the defaulting district loses its portion of the fund; which, after a certain period, is appropriated to the support of free schools in other districts. No ingenuity can discover the shadow of similitude between the act of the 19th of February, 1847, and any part of the school law. To say that the authority given to the school voters—to members of a corporation, to determine whether a tax shall be laid or not, is a grant of legislative

power, is an abuse of language. Legislative power is the power of making laws. The making of a law, prescribing by what persons, or by what body, when, and in what manner, taxes shall be laid and collected, is the exercise of legislative power. But the making of a resolution, or order, or the determination or direction, by the persons or body appointed for such purpose by the law, that taxes shall be laid and collected, is simply the execution of an authority granted by statute. The collection of them is the performance of a mere ministerial duty. The imposition of taxes, therefore, by managers of marsh companies, and other incorporated bodies, and by the Levy Court of a county, is the execution of an authority granted by the statute which appointed them as the proper persons, or body, to carry its provisions into effect; and is not the exercise, in any sense of the term, of legislative power."

The opinion concludes by forcibly pointing out some of the evils to be apprehended from the habit of referring questions back to the people, and declaring it to be the duty of the Judiciary to resist all such violations of the constitution.

"It has been argued, with much force, that the Legislature have no authority to call into action the elective franchise in any other cases, or for any other purposes, than those designated by the constitution: that the peace and harmony of society are not to be invaded, nor the passions of the people excited, by calling them out to vote upon speculative questions of morals or policy; that the meaning of an election, and the legitimate object of the ballot-box, is the choice of men to fill public offices, and of representatives to carry out political measures for the interest and welfare of their constituents and the community at large; and that every conceivable case, where such an election can be necessary or proper for public purposes, is provided for by the constitution itself. There is much strength in the argument; and it may be well questioned whether the Legislature constitutionally possesses such authority. But it is quite certain that they usurp power when they call on the people to legislate by the ballot-box. If they can refer one subject, they can refer any other to popular legislation. There is scarcely a case where much diversity of sentiment exists, and the people are excited and agitated by the arts and influence of demagogues, that will not be referred to a popular vote. The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the worst evils that can befall a republican government; and the legislation depending upon them must be as variable as the passions of the multitude. Each county will have a code of laws different from the others: murder may be punished with death in one; by imprisonment in another; and by a fine in a third; slavery may exist in one, and be abolished in another. The law of to-day will be repealed or altered to-morrow, and every thing be involved in chaos and confusion. The General Assembly will become a body merely to digest and prepare legislative propositions; and their journals a

register of bills to be submitted to the people for their enactment. Finally: The people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary and excited majorities, will be thrown down, and a pure democracy, 'the worst of all political evils,' will hold its sway under the hollow and lifeless form of a republican government.

"The only check which the constitution interposes to an act of the Legislature tending to such consequences, is an independent and upright Judiciary. As the act, passed on the nineteenth of February, A. D. 1847, entitled 'An act authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them,' is repugnant to the principles, spirit and true intent and meaning of the constitution of this State, and tends to subvert our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void."

SUPREME COURT OF OHIO, HAMILTON COUNTY: MAY TERM, 1848.

[BEFORE JUDGES READ AND HITCHCOCK.]

EDWARD TUITE *v.* WILLIAM MILLER.

A claim of dower is embraced by the covenant of general warranty.

An assignment of dower by a certain share of the rents and profits made a charge on the land, and enforced by an order for its collection, is equivalent to an actual eviction of one-third of the land by an assignment by metes and bounds, and putting the widow in possession.

After the decision in 10 *Ohio Rep.* 382, Tuite brought an action of covenant, in the Superior Court of Cincinnati, which was taken by appeal to the Supreme Court. The case was submitted to the Court, and the facts, as agreed and understood by the parties, were briefly these:

On the 28th of April, 1836, Miller conveyed to Tuite, in fee simple, a lot in the city of Cincinnati, and in the deed covenanted that he was the "lawful owner of the premises, and had good right so to sell and convey the same;" and also that he would "warrant and defend the same against all persons whomsoever."

Elizabeth Satterthwaite filed her bill in the Common Pleas, setting up a right of dower on the lot, prior to the date of Miller's deed, and at November term, 1838, obtained a decree of the Court, establishing her right. And it being ascertained that the dower could not be assigned to her by metes and bounds, a valuation was returned, and the Court finally decreed that Tuite pay her $62.38 for her dower up to that time, and pay the further sum of $66 a year thereafter, during her natural life, payable half yearly, in May and November. This was made a charge upon the lot, and in default of payment of any part of it, the Sheriff was ordered to sell so much of the lot as should be necessary to raise the sum due. An order issued, and the first sum due was paid to the Sheriff, with costs, amount to $87.86, without levy or sale. Tuite paid the other instalments as they fell due, without further order.

The case, after having been argued several times before the Supreme Court in the county, and in Bank, was again heard at this term.

Gholson & Miner, for Plaintiff.

A. N. Riddle, for Defendant.

Hitchcock, J., delivered the opinion of the Court. There was no doubt, he said, but that the claim of dower was covered by the covenant of general warranty contained in the deed. The doubt in the case had been whether the facts showed a sufficient eviction to enable the plaintiff to maintain the action.

There must, he said, be an eviction or something equivalent. The regular mode of assigning dower was by metes and bounds, and putting the widow into possession of the part so assigned. Had this been done, it would, without doubt, have been an actual eviction.

The statute provided that when dower could not be conveniently assigned by metes and bounds, it might be assigned in a special manner, as of a third part of the rents, issues and profits. The manner of assignment, then, was in the discretion of the Court; and any special mode adopted by the Court should be considered as equivalent to the regular mode, and substantially an eviction.

The recovering of the plaintiff was not to be limited to the amounts he had actually paid under the order of the Court, but he was entitled in addition, to the value of the incumbrance, to be calculated according to the tables of annuities, not exceeding one-third of the consideration money and interest since the eviction. And judgment was rendered accordingly for the plaintiff.

NOTES OF RECENT DECISIONS.

Eng. Chancery, Nov. 1847. *Callow* v. *Howle.* [*Chy.* 17 *L. J. R.* 71.]

BARON AND FEME—SEPARATE ESTATE—EVIDENCE.

In a suit against husband and wife in respect of wife's separate estate, the husband and wife put in a joint answer: Held, that the wife's answer might be read as evidence against her.

A, before her marriage, employed C, as a Solicitor, in respect of an estate which, on her marriage with B, was settled to her separate use. After the marriage, C was employed by B in respect of actions relating to this estate, and in preparing deeds for the appointment of new trustees of the settlement. C delivered his bill of costs to B, caused it to be taxed, and obtained a rule for a judgment against B. B immediately after became bankrupt, and C proved the debt in the bankruptcy, but received nothing. C then filed a bill against A B, and the trustees of the settlement, for the purpose of recovering the debt from the separate interest of the wife in the estate. Held, that C had no claim against A in respect of any thing but the deeds of appointment of new trustees; and that, if he had any claim in respect of these deeds, he was precluded, by his proceedings against the husband, from enforcing them.

Eng. Chancery, Dec. 1847. *Fitch* v. *Weber.* [*Chy.* 17 *L. J. Rep.* 73.]

NATURALIZATION—CHIL REN OF NATURAL-BORN SUBJECTS BORN ABROAD—PARENT ABJURING ALLEGIANCE.

In 1784, after the rocognition of the Independence of the United States by the treaty of 1783, A, a British-born subject, emigrated to Virginia, and in the same year took the oath of allegiance to the United States, and continued to reside there, exercising all the rights of an American citizen until his death in 1833. By the terms of the oath, he abjured allegiance to any other State, &c. In 1787 A married the daughter of an American citizen, and had issue, a son B, who never came to this country, and died abroad, leaving a son C, who, according to the pedigree, was the heir of the testatrix in this cause. The testatrix died in 1839, and, in a suit instituted to administer her estate, C, by his answer filed in 1840, claimed to be her heir. In 1846, C, for the purpose of complying with the requisitions of 13 Geo. 3 c. 21, left New York, and in the same year arrived in England, and received the sacrament, and took the oaths as prescribed by that act, and thenceforth contiuued to reside in this country. Upon exceptions to the Master's report finding C to be the heir, it was held, first, that the treaty of 1783 did not apply to A, who had emigrated subsequently to that treaty. Secondly, that the subsequent treaty of 1794 was local; and A did not reside within the locality. Thirdly, that A by his own acts had not, at the time of the birth of his child, absolved himself from his allegiance, nor divested himself of the character of a natural-born subject. Fourthly, that the exception in the 4 Geo. 2 c. 21, as to the father's being liable to the penalties of treason, was referable to a well-known class of offences, and ought not to be extended; that therefore C, under the 7 Anne, c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, was entitled to all the rights and privileges of a natural-born subject, and capacitated thereby to take lands by descent. Lastly, it was sufficient that C should have made his claim within the

five years allowed by the last named act; and that it was not necessary that he should have complied with all the requisitions of the same act within the five years, but a reasonable time must be allowed him for that purpose.

Eng. Chan. Nov. 1847. *Wood* v. *Rowcliffe.* [*Chy.* 17 *L. J. Rep.* 83.]

CONTRACT—SPECIFIC CHATTELS—PROTECTION—INJUNCTION—DECREE, FORM OF.

A, being in possession of furniture belonging to the plaintiff, contracted to assign it to B, who advertise it for sale. The plaintiff obtained an injunction to restrain the sale of it; and the bill was retained for a twelve-month, with liberty for the plaintiff to bring an action of trover.

Such a decree should contain directions respecting the bill, in case the plaintiff should not bring an action.

The right to be protected in the use or enjoyment of property, in specie, is not confined to articles possessing some peculiar or intrinsic value.

Eng. Chancery, Dec. 1847. *Rocke* v. *Cooke.* [*Chy.* 17 *L. J. Rep.* 93.]

LIMITATIONS, STATUTE OF—LACHES.

In 1825, the plaintiff brought an action against a lunatic, for debt. The lunatic and his committees thereupon filed a bill in equity to restrain the plaintiff from prosecuting the action. By an order made in this suit in July, 1825, by consent, it was ordered that the plaintiff should be restrained from further prosecuting the action, or commencing any other proceedings at law in respect of the debt, and that the proceedings in the suit should be stayed, and that the plaintiff should be at liberty to carry in his claim before the Master in the matter of the lunacy. In 1828, the Master reported that the plaintiff's claim required further consideration; and in 1830 made a report as to debts, in which no notice was taken of his claim. The commission of lunacy was never superseded, and the lunatic died in 1843. A bill filed by the plaintiff in 1844 against the lunatic's representatives, (so constituted by a will dated before the lunacy,) in respect of the debt, was dismissed, with costs.

Queen's Bench, November, 1847. *Rowlands* v. *Samuel.* [*Q. B.* 17 *Law Rep.* 65.]

MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE—COSTS OF INDICTMENT—DAMAGES.

Though the question of reasonable and probable cause is to be determined on facts, the existence of which, in cases of doubt, can only be properly decided by the jury, yet it is not necessary for the Judge when there is a variety of facts, to leave each fact specifically to the jury, but to decide, on a general view of the circumstances, whether there is or is not reasonable and probable cause for the prosecution.

When one of several defendants, in an indictment for conspiracy, pays the costs of himself and the others, of defending the indictment, he may recover such costs as damages in an action for malicious prosecution.

Queen's Bench, Nov. 1847. *Heraud* v. *Leaf.* [*Q. B.* 17 *L. J. R.* 57.]

CONTRACT—PRINCIPAL AND AGENT—PARTNERSHIP—WORK AND LABOR.

A Review was established by an association of shareholders, who passed certain resolutions for its management and regulation. A committee of shareholders was appointed "to assist the editor in promoting the prosperity and circulation of the

Review, and to obtain, as far as possible without expense, literary contributions, and to aid the editor as he might require in all matters connected with his department." Held, that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the Review.

Exchequer of Pleas, Nov. 1847. *Goudy* v. *Duncomb.* [*Exch'r.* 17 *Law J. Rep.* 76.]

ARREST—PRIVILEGE OF PARLIAMENT—PROROGATION AND DISSOLUTION.

Members of the House of Commons are privileged from arrest on a *ca. sa.* for forty days before and forty days after the meeting of Parliament: and the rule is the same in the case of a dissolution as in that of a prorogation of Parliament.

English Common Pleas, November, 1847. *Catlin* v. *Barker.* [*C. P.* 17 *L. J. Rep.* 62.]

TRIAL—RECALLING WITNESS.

A witness on cross-examination answered a question put to him by the defendant's counsel, and went on to make a further statement, which was not legal evidence. The plaintiff's counsel in reply remarked upon this further statement: he was stopped by the jury, who understood the witness to have said the direct contrary to that attributed to him by the plaintiff's counsel, who then wished to recall the witness, but the Judge refused to let this be done. Held, that the witness having volunteered a statement which was not evidence, it was the duty of the Judge not to notice it; and that he was right in refusing to recall the witness to correct the mistake of the jury as to what the statement was.

English Common Pleas, Nov. 1847. *Williams* v. *Archer.* [*Ib* 82.]

DETINUE—REDELIVERY AFTER ACTION AND BEFORE VERDICT—MEASURE OF DAMAGES—JUDGMENT, FORM OF—RAILWAY SCRIP.

In detinue for detention of certain railway scrip, redelivered to the plaintiff after action brought, and before verdict, the jury may, as a measure of damages, take into consideration the difference between the value of such scrip at the time of the demand, and their value at the time of such re-delivery.

In such action, when by reason of a redelivery before verdict, a subsequent delivery becomes impossible, the jury may find the facts specially, and so confine themselves to an assessment of damages; and in such case the form of judgment may be simply that the plaintiff do recover his said damages and costs.

Supreme Court of New York, Jan. 1848. *People* v. *Steele.* [10 *Law Reporter* 541.]

METHODIST CHURCH—POWER OF BISHOP.

The intention of the donors is the criterion by which to determine whether the acts of trustees of property have been such as to withdraw it from the purposes to which it was dedicated; and this intention can be inferred from the terms of the the grant and the contemporaneous acts of parties.

The itinerancy of the priesthood, in the M. E. Church, enforced by the power of the episcopacy, is the established practice of that Church.

The great and paramount duty of all trustees of religious corporations, is to see

that the temporalities committed to their charge are fairly and fully devoted to the purposes of their founders; and consequently, when the intention of the donors was the establishment of a Methodist Episcopal church, in connection with the general church of that denomination, the act of the trustees in refusing to receive a preacher appointed by the Bishop, is an act of insubordination.

The duty of Courts of law in such a case is to enforce performance of their duty by the trustees, unless that performance involves some violation of the law of the land.

Such a course would not, in this case, violate any law. A peremptory *mandamus* issued.

English Common Pleas, Dec. 1847. *Hartley* v. *Cummins.* [10 *Law Reporter* 84.]

MASTER AND SERVANT--CONTRACT—MUTUALITY—RESTRAINT OF TRADE.

The plaintiff agreed with T. P. in writing, among other things, that T. P. should, for seven years, serve the plaintiff and his partner or partners for the time being, or such of them as should carry on the trade of a glass and alkali manufacturer, then carried on by the plaintiff; that T. P. should not absent himself from such service without the license of such persons so carrying on the business, nor serve other persons during the term; that the plaintiff should, during the time T. P. continued employed, pay him 24*s.* per week for 1,200 tables, and other rates for extra tables, and when tables are not wanted should find him other work, so that he should not earn less than 24*s.* per week, except when a furnace was out, when he should have 21*s.* per week; and in case that T. P. should become incapacitated to perform, or should fail to perform such work, or if the plaintiff or his partner, &c. should discontinue the business during the seven years, then that they should be able to employ other persons, and should not be bound to pay any thing to T. P. Held, that this agreement was not void, either for want of mutuality, or as being in restraint of trade.

New Jersey Essex Circuit Court. Graves v. *Gamble.* [7 *Pa. L. J.* 270.]

COMMON CARRIERS—PASSENGERS.

The New Jersey Railroad Company are common carriers of passengers for hire, and as such are bound to carry a passenger to his destination upon his paying the usual fare, unless good reason be shown to the contrary.

The Railroad Company may make and enforce such regulations as are reasonable, and as may be found necessary in the fair transaction of their business.

The question of the reasonableness of the regulation is a question of fact to be submitted to a jury.

The exercise of a clearly legal right may amount to a trespass, if unnecessary violence be used. The question whether the defendant exercised any force beyond which the necessity of the case clearly required, is a question of fact, and is to be submitted to the jury.

Supreme Court of Texas, Dec. 1846. *Cocke* v. *Calkin.* [10 *Law Reporter* 488.]

WHEN TEXAS CAME INTO THE UNION.

The Republic of Texas did not become a State of this Union, nor subject to the Constitution or laws of the United States, before the 16th day of February, 1846.

A treaty, a confederation, and a constitutional compact may be established at one time, to go into effect *in futuro*.

The approval, by the Congress of the United States, of a State Constitution, does not, necessarily act as an admission of the State, nor abrogate its former government.

The compact between Texas and the United States, is of paramount obligation, and renders the subsequent acts of either party repugnant thereto, null and inoperative.

The admission of Texas into the Union as a State, did not, of itself, extend the Constitution or laws of the United States over its territory; but Texas had the right and power to stipulate, that its former government and laws should continue unaffected by the change, to a certain period.

The laws of the Republic of Texas regulating impost duties, continued in full force, unimpaired by the act of the Congress of the United States of the 29th December, 1845, until the 16th day of February, 1846.

Supreme Court of Pennsylvania, May, 1847. *Hamilton* v. *Lycoming Mutual Insurance Company.* [10 *Law Reporter* 498.]

WHEN POLICY ATTACHES.

The plaintiff having an interest in a building, applied to the agent of a mutual company for an insurance, and, at the same time, made the necessary cash payment, and executed the premium note. The application being transmitted to the Company, an alteration in the building was directed, and an authority required from the trustees of the building to effect the insurance. This was communicated to the plaintiff by the Secretary, who stated, when the Company were duly certified these had been complied with, a policy would be sent. The conditions were complied with, and the agent notified and requested to call and examine, but he neglected to do so. Held, the risk commenced from such notification of compliance with the terms of the conditional agreement.

Corporations may contract by parol within the sphere of their proper functions.

An offer to contract, communicated by post, must be considered as continually made until it reaches the other party. If he accepts before the knowledge of a retraction of the offer, the contract is binding. Per Gibson, C. J.

Supreme Court of Pennsylvania, Dec. 1847. *Commonwealth* v. *Fox.* [7 *Pa. Law Jour.* 227.]

ENLISTMENT OF MINOR.

Where a minor is detained by an officer of the army of the United States as an enlisted soldier, State Courts and State Judges have an undoubted concurrent jurisdiction with those of the United States.

The Act of Congress of 16th March, 1802, § 11, is clear and explicit in its phraseology. Both the enlistment of a minor, and his detention in the army without his father's or guardian's consent, are illegal, and the officer enlisting or detaining him is liable to an amercement.

The contract of enlistment into the army, without the assent of the parent or guardian of a minor, is void *ab initio*, and the minor may leave the service of the United States.

The enlistment of minors in the Navy, is valid, being expressly authorized by Act of Congress.

Baltimore County Court. *Cohen* v. *Mutual Insurance Company of New York.* [7 *Pa. Law Jour.* 233.]

INSURANCE—ABANDONMENT.

The information which is sufficient to authorize the assured to give notice to the underwriters that he abandons, must be of such facts and circumstances as would sustain the abandonment, if existing in point of fact, at the time the notice is given.

The underwriters ought to know the grounds of the abandonment, that they may determine whether to accept; accordingly, the assured must, at the time of making the abandonment, make known to the insurers the reasons for which he abandons.

Assured cannot avail himself of any other ground than that alleged by him at the time of abandoning; and if there be any other facts, (either known or not known to him at the time,) on which an abandonment would be necessary, in order to entitle him to recover for a total loss, he must abandon anew, before he can recover for such loss, on account of those facts.

The facts disclosed in the notice of abandonment, must show a total loss, either actual or technical; unless they do, the abandonment is wholly defective.

Where the master acts in good faith for all parties concerned, and under a necessity which requires the sale of the vessel, such acts and sale make a total loss; and in such a case, the assured is under no obligation to abandon at all to entitle him to recover for a total loss.

Where the insured has property which he can transfer, he is bound to abandon; but when he has been divested of his title by a sale, which is warranted by the rules of law, there is nothing to abandon, and he is not compelled to perform a useless and unmeaning ceremony.

The *necessity* which will justify a sale by the master, is such an *urgent* necessity, as renders delay highly perilous, or ruinous to the interests of all concerned.

Supreme Court of Pennsylvania, March, 1847. *Walker* v. *Physic.* [10 *Law Reporter* 441.]

ASSIGNMENT OF LEASE.

The assignment of land, on which a perpetual rent has been reserved, "under and subject to the payment of the said rent as the same shall accrue forever," does not create any liability by the assignee to indemnify his assignor or payments of rent accruing after the assignee has assigned over, which were compelled under the personal covenant in the original ground rent deed; and this whether the assignment be by deed poll or indenture.

Supreme Court of Pennsylvania, March, 1848. *Root* v. *Crock.* [*Pa. L. J.* 285.]

Certain heirs made an amicable partition among themselves, and established a boundary line which encroached one or two feet on adjoining premises belonging to a stranger, and known as the Hopple tract. One of the heirs subsequently bought the Hopple tract, and in an ejectment to recover the one or two feet encroached upon, it was held that he was estopped by the recital in the deed of partition from disputing the fact of the boundaries being as agreed upon in that deed.

Though a party to a deed is not estopped by a general recital, he is estopped by the recital of a particular fact in that deed, from denying such fact. *Judgment affirmed.*

ABOLITION OF CAPITAL PUNISHMENT.

[This journal has heretofore taken decided ground in favor of trying the experiment of abolishing capital punishment. Michigan is the only State of the Union which has yet tried it, and thus far with success. But while there is a constantly increasing party all over the world in favor of the experiment, there is as yet a still stronger one against it. This may even be true, so far as the writer knows, even with respect to the trio of Editors of this journal. All, howevever, must admit that the subject is worthy of the gravest consideration. We therefore invite attention to a view of both sides of the question; and to this end we publish a Report of Edmund Archbold, of the Ohio Senate, at its last session, against the experiment; and in our next number we shall publish an Address of James H. Titus, of the New York Society, at its recent anniversary, in favor of it. Both are well worthy of a perusal. W.]

REPORT OF THE SELECT COMMITTEE ON CAPITAL PUNISHMENT.

In Senate—January 26, 1848.

The select committee to whom was referred the petitions of divers citizens of Lake and other counties, praying for the abolition of capital punishment, has bestowed upon the subject a degree of attention not perhaps adequate to its importance, but such as his limited time and the pressing demands of other business would permit; and now most respectfully asks leave to report the result of his reflections.

The subject is a grave one. The approach to it banishes all levity, and even suppresses gaiety. No man's vanity would choose it as occasion for an effort to glitter or to please. But it is brought to our notice by our constituency; and men who undertake to perform, however imperfectly, the duties of Statesmen, must address themselves to the task assigned, whether agreeable to their inclinations or not. Arduous laborers in a work-day world, it is not for them to decline the performance of any necessary duty.

The numbers and character of the petitioners, and the amiable and exalted degree of moral feeling by which a great majority of them are unquestionably actuated, demand from the Senate a most cordial and respectful consideration for their petitions. From present indications, it is not probable that any act interfering with the present law on the subject of capital punishment can pass the Senate during the present session. It is highly proper, therefore, that the reasoning which has governed our action should be spread before the world. In an enlightened and inquisitive age, the legislator, who feels bound by a sense of duty to refuse legislation called for by

a respectable portion of his fellow citizens, should stand upon his rendered reasons, well convinced that his compeers, though they may deny the correctness of his logic, will feel less dissatisfaction when they perceive that he is governed by correct moral motives, by a train of reasoning, though supposed to be erroneous, and, in one word, by a feeling of obligation and duty.

In looking through these petitions, as well as many others which have been presented to the Assembly during the short legislative experience of the subscriber, it will be perceived that some of them are filled with mere declamation—with declamation consistent indeed, with the high tone of moral feeling which your committee has attributed to the majority of the petitioners, but not a whit the less poetical and declamatory on that account. Some of the petitioners have reasoned, and reasoned acutely and ingeniously; but, denying the truth of their premises, your committee has arrived at different conclusions. They lay it down as a kind of postulate, that the end and aim of all human punishments is, or ought to be, the reformation of the offender. In this the petitioners are not singular: the same arguments will probably be found in the writings of almost every man, whether European or American, who has written against capital punishment.

But the soundness of the position is denied; and your committee on the contrary contends, that the reformation of the criminal ought never to be the principal motive of any human legislator in enacting laws, nor of any human tribunal in enforcing them. It may be a very good secondary consideration, both with the legislator and with the Judge, and may well be sought after as an auxiliary to the main design of human punishment; but it never can be looked upon as the principal object to be attained in an enlightened system of human jurisprudence. To punish His creatures for the reformation of their morals, is one of the prerogatives of that dread Being from whom all created things have received their existence, and who knows how to proportion the penalty to the guilt with absolute exactness. To attempt to imitate His example in this particular, would be impious presumption. Is any man startled at these propositions? Let him reflect whether any conceivable degree of turpitude, committed by an individual in private, and without invading the rights of others, will authorize human interference and human punishment.

We shall be the more impressed with the correctness of these deductions, if we listen to the voice of history, which decides that, in

point of fact, every tribunal which has acted on the principles which we impugn has been a horrid tyranny. Witness the odious and execrable Inquisition. Witness every other tribunal, whether civil or ecclesiastical, which has ever attempted to inflict penalties upon men for the reformation of their manners, or the good of their souls. Very many of these institutions sunk under the weight of the execration of mankind in the latter part of the last century, and in the beginning of this. But the principle upon which they were founded has been revived and made prominent in the modern arguments against capital punishment. Can that which was false and mischievous in the eighteenth century, be true and useful in the nineteenth? Can error ever be useful? Or can truth ever be pernicious?

These reflections induce your committee to believe that it is important that the community as well as the Senate should entertain correct elementary ideas on the subject of criminal jurisprudence. Error, however well intended, must lead to bad consequences.

Having denied that reformation of the criminal's manners, or the good of his soul ought to be the principal end and aim of human punishment, it may be asked, what should be that principal end and aim? What should be the dominant motive in the legislator's mind when he denounces penalties against crime? We answer unhesitatingly, and without the least fear of contradiction, THE SAFETY OF THE GOOD CITIZEN. To this let his attention be directed. Bearing this in mind, the further pursuit of our inquiries will be comparatively easy.

But one crime is capitally punished in our happy commonwealth, namely: wilful, malicious, and premeditated murder. Surely no man will contend that the personal safety, or any other interest of the assassin, or of any number of assassins, ought to weigh more than the dust in the balance against the safety of the good citizen. It is to preserve the father, who toils incessantly for the welfare of his rising family, from secret ambuscade; it is to preserve the mother, who watches her sleeping charge with ineffable delight and affection, from midnight violation and assassination, that our efforts are to be directed. How shall we best effectuate this object? By the denunciation of the State prison, of hard labor and coarse fare against the guilty wretch, or by the denunciation of death, that last and highest and most appalling of human penalties. It is confidently believed that the latter will prove the most effectual. The love of life is instinctive in the human breast. It is implanted there by the

Great Creator of all things. Men have no choice whether they will listen or refuse to listen to the voice of that prompter. Nor are its thunder tones at all drowned or deadened by the consciousness of blackest guilt, which the criminal is about to incur, or the near approach of that dread and invisible futurity, which, of all men living, he has most reason to fear. Ought not the legislator to address himself to the strongest feeling of such a base and atrocious wretch? Ought he not to forbid the crime which the ruffian meditates by an array of the most imposing terrors?

Many of the petitioners who, from time to time, have appeared in our halls concerning this subject, complain of being shocked at the sight of an execution. They dilate upon the circumstances of horror which attend it. The executioner, the scaffold, the gallows, the rope, the shroud, and above all, the guilty and horrid wretch himself, who is about to suffer, fill their minds with the most terrific sensations, and they shrink back appalled. And their sensations are perfectly natural. It is their instinctive love of life which has been pained and shocked. Have we any reason to doubt that this instinct is just as strong in the breast of the ruffian who premeditates a murder as in the breasts of these petitioners, though he, unfortunately, lacks the fine moral sensibilities by which they are restrained? To the mind of your committee, every one of these petitions unintentionally speaks, trumpet-tongued, against the abolition of capital punishment for the one horrid crime of murder in the first degree, the only case in which it is known to our laws. Whenever it shall appear that our people regard life with indifference, that they can look upon an execution with complacency, that death has no terror for them, then, and not till then, will it be the duty of the law-giver to forbid the foulest form of assassination under some penalty more stern and more effectual than death.

Your committee is free to acknowledge that the sight of a public execution is shocking and painful; it is a sight which the writer of these lines has never witnessed, and will never willingly witness; but there is a sight more shocking and painful still to a well ordered mind, and that is the sight of a horrid assassin escaping with less punishment than his crimes deserve, and with less punishment than will be sufficient to deter other ruffians from imitating his example. The petitioners may well reflect, that a wilful murder cannot be committed, in the midst of our peaceful and virtuous communities, without a severe shock to the moral feelings of our citizens. And they may rest assured, that if their feelings of compassion are tor-

tured by the execution of a ruffian for the worst and foulest species of murder, the sense of justice of our citizens, equally generous in feeling and equally compassionate, is tortured by his escape from condign punishment. And it is the business of the legislator to prevent such shocks to the feelings of the commnnity, by denouncing such punishment as will most effectually tend to the prevention of the crime. The virtues of mercy, of pity, of compassion, unquestionably constitute the great ornaments of the manly character, but they require the substratum of a firm and manly character, else they lose half their lustre. They must be tempered by a strong sense of justice, else they will run to waste; or, in other words, expend those sympathies on the brutal ruffian, which ought to be reserved for his victim. In any and in every view which your committee has been able to take of the subject, it seems apparent that the law-giver is bound to adopt no half-way measures with the ruthless ruffians on whose behalf the petitioners have appeared in our Hall, but that he is bound to attack the strongest instincts and deepest feelings of their natures, and not to rely on any secondary or inferior motive.

Some of these petitioners have had their sympathies imposed upon by the tales which are floating in our flashy and ephemeral literature, about the sacrifice of human life, and the condemnation of the innocent by circumstantial evidence. They say, "the lives of innocent men are continually being sacrificed under this law." Ought not these benevolent and well-meaning petitioners to know that these tales are manufactured to order. That they are fixed up for theatrical effect. These stories are often headed, "uncertainty of circumstantial evidence;" but they are generally so bunglingly manufactured, that it is easy to see that it is direct perjury, and not circumstantial evidence, which is to be blamed. From this sweeping assertion of the petitioners, they seem to think that our courts and juries are ready and willing to convict; that the lives and liberties of men are held by them in low estimation, and slightly sacrificed upon light and unsatisfactory evidence. We confidently appeal to every man, at all acquainted with our judicial tribunals, if the contrary be not the fact—if the criminal is not allowed the benefit of every doubt. This committee has been intimate with the courts of justice from early youth to this day—has been engaged in conducting criminal trials in two States of the Union, both for the prosecution and for the defence, and certainly can have no motive to make a rash assertion; yet he entertains not the slightest suspicion that he has ever seen the innocent convicted of any crime; but the converse of the proposition, the acquital of the guilty, is a common occurrence. It would be rash to affirm that the conviction, even the capital conviction of an innocent man, is impossible in Ohio, certainly such an event is highly improbable. If an innocent man was ever capitally convicted in this State, when, where, did such

a deplorable event occur? *He* would be a timid or a facile legislalator, who would alter the criminal code to provide against the occurrence of a mere abstract, ultimate, improbable possibility.

Some of these petitioners say that crime has not increased, but diminished, by means of the abolition of the "death penalty." And they instance England, Maine, Vermont, and several other far-off countries of Europe. What do they mean? Do they mean that murder is not capitally punished in England? The criminal code of most nations of Europe is believed to be so very different from ours, as to present but little analogy. It is so, unless very modern alterations have assimilated their codes to ours. The taking of man's life for mere theft or forgery, is so rude and awkward an expedient, that is easy to believe that a little more wisdom employed in proportioning penalties to crimes, might be more effectual for the purpose of repression. Where penalties are manifestly outrageous, and disproportioned to the turpitude of offences, criminals will often escape by the forbearance of sufferers refusing to prosecute.

As to Maine, the committee knows nothing. Her statute is probably new. That of Vermont is new. The ink must be suffered to dry on the paper on which it is written before we appeal to her experience. Most unhappily we have experience nearer home. We have several counties and districts in which an appalling series of homicides have taken place within the last fifteen years. The committee is not speaking rashly. It would be highly invidious and improper to name those counties and districts, or it would be easy for the committee to do so. Yet, in all these instances occurring in five or more counties, not one capital conviction has taken place. The plan of the petitioners has been in operation there, through the mistaken and ill-requited lenity of juries. And there is nothing amiable or merciful in its workings to make us desire its continuance, or its further predominance. On the contrary, we can assure the petitioners that the sensibilities of men as merciful and compassionate as themselves, have been tortured by the very gravest suspicions that several innocent victims have been sacrificed in consequence of the above mentioned undue and mistaken lenity of juries, in refusing to deliver over atrocious criminals to condign punishment. If so, their mawkish and sickly sentimentality has been productive of tragical consequences. It is believed that a capital execution occurring some years ago would have saved several innocent lives. This proposition is not capable of strict demonstration. But to those who are acquainted with the strenuous efforts the criminals, their friends, and counsel, to escape a capital verdict, by means of one which would eventuate in imprisonment in the penitentiary, it has the weight of moral certainty, especially when connected with the declarations of offenders, of their abiding confidence in the extreme difficulty or impossibility of obtaining a capital conviction. It is not demonstration in the minds of the committee, but it affords a moral certainty, which would govern the committee in personal affairs of the last and highest importance.

What conclusion are we to draw from all this? Are we to abolish capital punishment because the mis-guided lenity of juries sometimes, or even frequently, refuses capital conviction? Certainly not. But on the contrary, it is our business to oppose ourselves to that morbid sentimentality which expends so much of its sympathies on the criminal, so little on his victim; which laments and weeps over the VICIOUS, as if they were merely UNFORTUNATE; which, in its undiscerning and undistinguished benevolence, imports whole cargoes of arguments used by European philanthropists against capital punishment for mere minor offences, without once considering whether the commodity is suited to our circumstances. Instead of yielding to the advances of error, let us go forth amongst our friends and constituents as the advocates of a higher, and a holier, and a purer morality.

Many other reasons might be adduced to fortify the conclusions at which the committee have arrived; but, to insist on them at large, would extend this report to a cumbrous and inconvenient length. Some remaining topics can only be glanced at. All men who have made jurisprudence their study, acknowledge the importance of a scale of punishments. If murder in the second degree deserves perpetual imprisonment, what penalty shall be awarded to murder in the first degree? "No wise law-giver will affix the same penalty to the crimes of theft and forgery, which he does to those of murder and treason." It is always advantageous to grant criminals a "place of penitence," to afford them motives to stop short of the highest atrocity, for fear of incurring the highest penalty. But, if the law at once expended its utmost terrors upon the highwayman or the midnight burglar, what further shall it address to the fears of the murderer? If it threatens those criminals with rigorous imprisonment and hard labor, ought it not to reserve some more dreaded penalty for the assassin, in the well grounded apprehension that the criminal may destroy his victim in order to get rid of the witness; or, if imprisonment more rigorous be denounced against the assassin than against the robber, will not the criminal be still tempted to weigh chances of a small and doubtful increase of punishment against a total escape which he knows will be facilitated by the death of his victim? Again: Ought not some ultimate penalty to be reserved for those miscreants who kill their keepers while undergoing a sentence of imprisonment for life? Ought the lives of our prison guards to be placed out of the protection of the law?

It would seem that no sovereign can, either in theory or in practice, renounce the right of taking human life in certain circumstances; that any scheme which proposes such renunciation, must be essentially Utopian and visionary. Suppose a sheriff, sent by the mandate of the law to arrest an assassin, who makes an armed resistance, attacks the sheriff, and in the encounter is himself killed? what will the petitioners do with the sheriff? Will they subject him to imprisonment, or even to disgrace or censure? If they answer no, they resign the whole argument, for here is a case in which the law

authorizes and permits the taking of human life, inasmuch as that which the law forbids must be visited with some penalty.

If the renunciation by any sovereign power, of the abstract right of taking human life, be essentially visionary and Utopian, the expectation that the denunciation of perpetual imprisonment, will prove as effectual a safeguard to the lives of the innocent and the good, as the denunciation of death would seem to be equally visionary and Utopian. The imprisoned murderer will always retain the hope of escape either by pardon or by the occurrence of some one of the long list of accidents to which the affairs of men are forever subject. If the sentence of perpetual imprisonment convey as much terror as the sentence of death, how does it happen that such efforts are sometimes made at the door of executive clemency, to secure a commutation of one sentence for the other? It may be further remarked, that there is not, perhaps, a single murderer within the wide walls of our State Prison, but is so far the object of a mawkish and sickly sensibility, as to have secured numerous applicants to the clemency of the Executive for this pardon. Scarcely has the guilty wretch arrived at his prison, when the mistaken compassion of some of his neighbors and acquaintances begins to get up petitions to the Governor for the exercise of the pardoning power. It would not, perhaps, be too harsh to say, that the number of these petitioners is sometimes swelled by the signatures of those who are actuated by a settled contempt of all moral distinctions. Let not the Senate or the community be persuaded that such petitions are not offered to the Executive: it is perfectly well known that they are offered in great numbers, and in behalf of wretches as base and atrocious as ever disgraced the human form; and the horrid parricide forms no exception to the remark. What language do these facts speak? Why simply, that if one class of our fellow citizens feel a repugnance against capital punishment, another class, equally numerous, feel a repugnance against that species of punishment which these petitioners would substitute for it, and some feel a repugnance against every species of punishment. In such cases, the legislator must adopt that line of conduct, be it what it may, which his reason and conscience assure him will best promote the safety and happiness of the good citizen, and leave the event to the Great Being in whose hands are the destinies of nations. But while it is known that morbid sympathy and sickly sentimentality present petitions to the Governor for the pardon of atrocious murderers, this committee will never be accessory directly or indirectly, to the abolition of capital punishment. The committee will indulge in a very short digression, in order to say that the Executive ought to be aware that very many names are subscribed to such petitions merely to get rid of importunity, by persons not gifted with powers of firm and determined resistance.

But your committee has seen no reason to believe that the great mass of our fellow-citizens feel any dissatisfaction with our criminal code, which certainly deserves to be characterized as eminently mild and merciful. This report must be drawn to a close. Philosophi-

cal inquirers will necessarily perceive that many topics of argument have been left wholly untouched. Witness, for instance, those ebulitions of popular violence which someties break out when it is believed that atrocious offenders have escaped with impunity, or with punishments too mild. The doings of Lynch courts, and the existence of those many indications, which prove that, in the language of some of the petitioners, the state of society is sufficiently advanced to admit of any very great changes in our criminal code. It is not known to this committee that Lynch courts have ever reared their gorgon heads in Ohio. It is believed they have shed no blood here; but they have done so in States where we should as little expect to find them. They are the most atrocious offenders against social order and the rights of mankind whom the sun beholds in his course. They have revived the old system of torture to compel innocent but suspected victims to give evidence against themselves, preparatory to their being murdered with every circumstance of atrocious barbarity. These ruffians excuse their truly diabolical deeds on the ground that the penal laws are too mild, that offenders are treated with too much lenity, and that courts and juries are too slow to convict. It is submitted, therefore, that we ought not to emasculate our penal code too much, that we ought not to palter with enormous criminals, and refuse to deliver them over to condign punishment, lest we inflict a shock on the sense of justice of our orderly and well-disposed fellow-citizens, and make them look on the doings of these ruthless ruffians with too many grains of allowance. And surely, these petitioners themselves will admit that the members of Lynch courts, when they proceed to assassination, ought to be hung, to the last man. If so, capital punishment ought not to be abolished: if the petitioners will not so admit, the committee must resign them as incorrigible.

Much more might no doubt have been said: many other arguments have suggested themselves to the mind of your committee, who has suppressed more than he has written. But the report is already of considerable length, and his is a puerile ambition who would wish to exhaust a subject, or say all that can be said. No time has been taken for revision—a measure very necessary no doubt, but forbidden by circumstances. Having arrived at the conclusion that the Senate ought not to take any steps to abolish capital punishment, your committee makes no recommendation except that he be discharged from the further consideration of the subject.

EDWARD ARCHBOLD.

January 26, 1848.

Miscellaneous.

DEATH OF AMBROSE SPENCER.

Not having access to any other notice of this eminent jurist, we take the following from the New York Tribune.

This eminent lawyer and distinguished statesman died at Lyons, at 10 in the morning of Monday, the 13th March, after a long and painful illness. It is our impression that he was a native of Duchess county. He had attained to the advanced age of 83 years.

Judge Spencer was one of the leading politicians of this State more than half a century ago. Originally a Federalist, he left that party and joined the Republicans in early life—perhaps about 1798—and for many years thereafter exercised a powerful influence in the affairs of this State. If we remember right, he opposed the chartering of the Merchants' Bank in 1805, about which there was so much difficulty. So, also, in 1812, he united heartily with Daniel D. Tompkins, then Governor, in the memorable struggle that preceded the declaration of war against Britain, to prevent the charter of the six million Bank. He was a bold and sagacious advocate and supporter of Madison and the war of 1812, opposing the claim of his brother-in-law, De Witt Clinton, to the Presidency, at that time, lest it should in any way be supposed to imply a disposition to withhold from the then Executive the fullest support in the struggle to get rid of impressment and the other evils that had been entailed on America in consequence of the war between England and France. One of his sons, Capt. Ambrose Spencer, died bravely fighting for his country at the battle near Niagara Falls. Another of them, John C. Spencer, who has since been member of Congress, Secretary of State, and Speaker of Assembly, in this State, and Secretary at War and of the Treasury, in the United States, was an Aid-de-Camp to Governor Tompkins during the struggle, conducted an influential press near the frontier, and was indefatigable in support of his country's honor and maritime rights. After the war, Judge Spencer and Governor Clinton were reconciled, and by their counsels rendered the State much good service for many years. As Chief Justice of the State, Mr. Spencer's unrivalled legal talents and sterling good sense obtained for him a vast influence in this community. He represented the City of Albany in the Convention to amend the Constitution, which sat there in 1821, and took a strong interest in its proceedings, which ended in decreeing, among other things, that no Judge was fit to decide in legal cases after he had arrived at the age of sixty, or in other words, that Chief Justice Spencer and Chancellor Kent must give way to the partizans of the faction then uppermost. Since his retirement, Judge Spencer has been engaged in several cases of magnitude, in the course of which he displayed great knowledge of the law and the Constitution.

Supreme Judges in Iowa. The Legislature of this new State, by reason of its peculiar organization, failed to elect Judges of the Supreme Court. It devolved, therefore, on the Governor to appoint; and he has, as we are informed, appointed Hon. S. C. Hastings, of Bloomington, Chief Justice, Hon. J. F. Kinney, of West Point, and formerly of Ohio, and George Green, Esq., of Dubuque, Associate Justices.

Curtis on Copyright. [A Treatise on the Law of Copyright in Books, Dramatic and Musical Compositions, Letters and other Manuscripts, Engravings and Sculpture, as enacted and administered in England and America; with some notices of the history of Literary Property, by George T. Curtis, Counsellor at Law. Boston: Charles C. Little and James Brown. 1847. pp. 103.]

We have had occasion to examine this work, and can, with confidence, commend it to our professional brethren. They will find it a full and lucid exposition of the law as it is upon the subject in question.

Mr. Curtis has given us, by way of an introduction, an article upon the theory of the right of authors, and, as his title page indicates, his first chapter is devoted to a history of literary property.

There is also an able and learned argument upon the English doctrine of abridgments.

Before considering particular forms and cases of piracy, Mr. Curtis examines the general doctrines applicable to the question of infringement.

"The statutes which secure the exclusive rights of authors, do not define, in any terms, what shall constitute an infringement of copyright. It is left to the tribunals to decide, in each case, upon the circumstances of the case, whether a violation of the right has been committed. On the one hand, the Courts must regard the existence of the exclusive right, when established or admitted; and on the other, the principle of public policy, which admits of some use of all antecedent literature. This last consideration, however, will not sanction direct and palpable injuries to the anthor, in whom the law has vested the sole right to take the profits of his own book and of every part of it. It becomes, therefore, a most material inquiry, in all cases, to ascertain whether the author has sustained or is likely to sustain any injury by the publication of which he complains; and perhaps it will be found that this is the test by which the question of infringement ought to be determined, in nearly all doubtful and difficult cases.

"I am not aware of any recorded decision, or of any principle of law, which would deny redress to an author who should prove a direct injury, upon the ground that the writer who had caused it had made a justifiable use of his work. It is easy to imagine cases, where the use which a subsequent writer makes of a previous publication is apparently within the limits of the general right of selection, or citation, or tacit adoption; but if an injury can be proved to be the effect, I know of no rule of law by which, consistently with the strict right of the previous author, such use can be pronounced to be admissible. The question, whether very trifling injuries will be redressed by one class of the public tribunals, is entirely aside from the strict right to redress from some tribunal, which depends upon no considerations of judicial convenience, or limits of jurisdiction. Notwithstanding some *dicta* in a few cases, and the general principle, (which cannot be established at a fixed line,) by which what is called the fair use of a previous publication is obscurely hinted at, I apprehend that the doctrine of our law is and must be, that where an injury is caused, an infringement is, in point of strict right, made out."

Mr. Curtis thinks the English doctrine of abridgments needs revision. After an examination of the English cases, he says: The foregoing are all the English authorities on this subject, and they show that for a considerable length of time the notion has prevailed, that what is called a bona fide abridgment may be made, without violating the right of property of the original author. He adds, however, by way of note on a succeeding page, that there has been no instance in which the doctrine has been directly resisted and examined in reference to principle. In this country, Mr. Curtis thinks, the subject has been only incidentally discussed, and that the authorities cited by him in a note will fully justify an examination of the ques

tion *de novo;* and after an argument of much force, he adds: I cannot but think, therefore, that the result to which English and American jurisprudence ought to come upon this question, is, that an abridgment in which the text, the plan, the ideas, arguments, narrative and discussion of an original author are reproduced, in a condensed form, is a violation of his right of property.

Judge Walker, in an article upon this subject, in the present volume of this Journal, (Dec. No. p. 97,) says: The right to make abridgments is not settled by any American decision, although frequently taken for granted both by authors and judges; and the English cases leave the whole subject in the greatest uncertainty not only as to the kind of works which may be abridged—as whether narrative or descriptive only, or scientific also—but as to what are the tests of a *fair* or *bona fide* abridgment—as, whether the injury done to the original work by competition, or the quantity of matter copied verbatim or the greater or less degree of fidelity in preserving the sense of the work abridged, shall be the controlling consideration. In fact, only one thing seems to be settled as the test of fairness, and that is a negation, namely, that the intention of the abridger has nothing to do with the question."

In the case of *Story's Executors* v. *Holcombe et al.*, decided in the Circuit Court of the United States for this district, last November term, reported in January No. present Vol. p. 145, Judge McLean says:

"On the subject of copyright, there is a painful uncertainty in the authorities; and, indeed, there is an inconsistency in some of them. * * The decision (in this case) must turn on the question of abridgment. If this were an open question, I should feel little difficulty in deciding it. An abridgment should contain an epitome of the work abridged—the principles, in a condensed form, of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable or unwilling to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down to the latest publications? The multiplication of law reports and elementary treatises, creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author—a right secured by law.

"The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement of the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now, an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built: and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

"But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent, and I yield to it, in this instance, more as a principle of law, than a rule of reason or justice."

We are promised by Mr. Curtis a work on the law of patents. We shall look with interest for this book. It is a highly important branch of the law, and the earnest we have, gives us assurance that important as it is, the subject will be treated in a manner worthy of it.

As to the mechanical execution of the present work, we need only say it is in Little & Brown's usual style.

It is for sale at the Law Bookstore of J. F. Desilver.